the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-695

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

espondent's basic argument is that the strikers not entitled to reinstatement at all because the e and the picketing were not protected by Section the Act (Co. Br. 14–32). For the reasons given ur opening brief (Bd. Br. 18–21) and those set below, this contention provides no basis for up- ing the court of appeals' judgment.

Respondent contends that, even if the object of strike was to force it to consent to an election, as court of appeals found, the strike was not pro- by Section 7. For, respondent argues, since 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), pro- for a hearing on a representation petition prior

478-438—72——1

edition as the representative of its employees, and its subsequent refusal to recognize the Union was a rejection of that demand. Accordingly, the Union's petition was a valid one which could have served as a basis for a Board election[*] had respondent refrained from unfair labor practices which precluded the holding of a fair election.

CONCLUSION

For these reasons, as well as those set forth in the Board's main brief, the judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Board's order requiring that Richard Dicus, Manuel and Robert Vasquez, and Salvider Casillas be reinstated with back pay.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney, National Labor Relations Board.

OCTOBER 1972.

---

[*] In any event, under the first proviso to Section 8(b)(7)(C), the Board may direct an election "without regard to the provisions of section 9(c)(1)."

U.S. GOVERNMENT PRINTING OFFICE: 1972

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL VAN LINES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-895. Argued October 12, 1972—Decided November 7, 1972

Four employees of respondent refused to cross a picket line formed in connection with a union's organization campaign. Respondent thereafter advised the employees that because of their failure to report to work they were being permanently replaced, which was not true at the time of the discharges. When respondent refused reinstatement, charges were filed with the National Labor Relations Board (NLRB). Concluding that the discharges were unfair labor practices under the National Labor Relations Act, and that the employees thereby became unfair labor practice strikers, the NLRB ordered unconditional reinstatement with back pay. The Court of Appeals reversed that portion of the NLRB's order, holding that the employees were not unfair labor practice strikers, who were entitled to unconditional reinstatement, but economic strikers, who were not entitled to reinstatement if the employer had substantial business justifications for refusing to rehire them. *Held:* The unconditional reinstatement of the employees was proper since their discriminatory discharges prior to the time their places were filled constituted unfair labor practices regardless of whether they were economic strikers or unfair labor practice strikers. Pp. 4-5.

448 F. 2d 905, reversed in part.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 71-895

National Labor Relations Board, Petitioner, *v.* International Van Lines.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 7, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent is a moving and storage company based in Santa Maria, California. In August 1967, Local 381 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America began a campaign to organize the employees of moving and storage firms in the area. By September 21, five of the respondent's employees had signed union authorization cards; it is undisputed that they constituted a clear majority of what would be an appropriate bargaining unit. Instead of demanding recognition by the respondent, the Union on September 21, 1967, petitioned the National Labor Relations Board for certification as the exclusive bargaining agent of the respondent's employees.

Shortly thereafter, on October 2 and 3, the Union held meetings where it was announced that the respondent had at first consented to a representation election but had later withdrawn its consent. It was decided at the October 3 meeting that all of the moving and storage companies involved in the Union organization campaign should be struck, and on October 4, picketing commenced at the respondent's place of business.

Four of the respondent's employees, Robert and Manuel Vasquez, Richard Dicus, and Salvador Casillas, were

present at the respondent's premises on the morning when picketing commenced. They refused to cross the picket line. The next morning, Robert and Manuel Vasquez and Richard Dicus received identical telegrams which read: "For failure to report to work as directed at 7 A. M. on Wednesday morning Oct. 4, 1967, you are being permanently replaced. [Signed] International Van Lines."[1] It is undisputed that at the time of the discharges, the respondent had not in fact hired permanent replacements.

Casillas sought reinstatement in late November, and the other three discharged employees made unconditional offers to return to work on December 12. At least as to these three,[2] the respondent refused reinstatement, claiming that it had at that point hired permanent replacements. The Union then went to the National Labor Relations Board with unfair labor practice charges against the respondent.

The Board determined that the labor picketing that commenced on October 4 was activity protected under § 7 of the National Labor Relations Act, 29 U. S. C. § 157, and concluded that the subsequent discharges of striking employees discriminated against lawful union activity and were unfair labor practices under §§ 8 (a)(1) and 8 (a)(3) of the Act, 29 U. S. C. §§ 158 (a)(1), (a)(3).

It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements. *NLRB* v. *Mackay Radio & Tele-*

[1] Casillas did not receive such a telegram, but the Court of Appeals found that he was discharged at about the same time as the other three, and for the same reasons. 448 F. 2d 905, 909.

[2] There remains some question as to whether Casillas, a part-time employee, was actually denied subsequent employment or whether instead there had been no occasion for the employer to use his services. The Court of Appeals remanded to the Board for a determination of this question—a determination that will affect the amount of back pay, if any, that Casillas is entitled to receive.

graph Co., 304 U. S. 333, 345–346. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with back pay, "even if replacements for them have been made." *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278. Since the strike in the instant case continued after the unfair labor practices had been committed by the employer, the Board reasoned that the original economic strike became an unfair labor practice strike on October 5, when the three telegrams were sent. The Board held the four employees to be unfair labor practice strikers and, accordingly, ordered their unconditional reinstatement with back pay.

The Board then sought enforcement of its order in the Court of Appeals for the Ninth Circuit. The Court of Appeals agreed that the labor picketing was a lawful economic strike, and that the discharges of the striking employees were unfair labor practices. 448 F. 2d 905, 910–911. Nevertheless, the Court of Appeals reversed the portion of the Board's order providing for reinstatement with back pay,[1] reasoning as follows:

> "The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their

[1] The Court of Appeals also rejected the Board's finding of an unfair labor practice in the form of conversations between the son of the respondent's president and the employees, 448 F. 2d 905, 908–909, but this aspect of the judgment is not before us.